Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

BLASE INDUSTRIES CORPORATION
D/B/A WILSON SOLUTIONS,

Petitioner

v.

ANORAD CORPORATION,

Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Did the Fifth Circuit's determination that it is impossible for any employer of an at-will employee to recover contract damages for lost profits contravene established law and public policy that embraces the execution of contracts and the punishment of breaching parties?

DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Petitioner Blase Industries Corp. d/b/a Wilson Solutions respectfully submits the following disclosure statement:

Petitioner Blase Industries Corp. d/b/a Wilson Solutions is the parent company; there are no related or subsidiary entities. Further, no publicly held company owns 10 percent or more of Blase Industries Corp. d/b/a Wilson Solutions's stock.

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BLASE INDUSTRIES CORPORATION
D/B/A WILSON SOLUTIONS,
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v.

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Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Blase Industries Corp. d/b/a Wilson Solutions ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 442 F.3d 235. (Pet. App. 2-9). The opinion of the district court is unreported. (Pet. App. 10-38).

JURISDICTION

Following Respondent's removal of Petitioner's lawsuit from state district court in Harris County, Texas, the jurisdiction of the trial court in the Southern District of Texas was invoked pursuant to 28 U.S.C. § 1441, 1332(c)(1). The court of appeals entered its judgment on March 1, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Course of proceedings and disposition in the court below.

Petitioner filed the instant litigation in the 189th State District Court of Harris County, Texas under Cause Number 2003-22871 on April 30, 2003. R 0008-0016). On July 1, 2003, Respondent removed the matter to the United States District Court for the Southern District of Texas, where it was assigned Cause Number H-03-2369. R 0021-0026). On July 14, 2003, Petitioner filed a motion to remand the case to the state district court. R 0044-0048). The motion was denied on September 15, 2003.

Both parties filed motions for summary judgment. R 0139-0178; 0288-0318). Petitioner's motion for summary judgment was denied and Respondent's motion for summary judgment was granted by the trial court's Memoranda and Opinion dated September 28, 2004. (Pet. App. 10-38; R 0755-0784). The trial court dismissed the case with prejudice on September 28, 2004. R 0785). Petitioner's motion for reconsideration and/or new trial was filed on October 4, 2004 and denied on December 3, 2004. (Pet. App. 39-41; R 0786-0796; 0831-0833).

Petitioner filed its notice of appeal on December 17, 2004. (R 0834-0835). On March 1, 2006, the United States Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court, holding that while Respondent had breached the no-hire agreement, Petitioner had not adequately proved its damages. (Pet. App. 2-9). Mandate issued on March 23, 2006. Hence, this petition for writ of certiorari.

B. Statement of Facts.

The material facts of this suit, which essentially are undisputed, are set forth in the trial court's opinion. R 0755-0784). Petitioner company's sole business was to provide computer software consultants to its customers, one of which was Respondent. In April 1997, Petitioner hired Jason Schwartzman ("Schwartzman") as an employee consultant. R 0783). Schwartzman earned consulting fees for Petitioner and a salary based, in part, on those consulting fees. R 0652).

On April 9, 1998, Petitioner and Respondent entered into a written agreement whereby Petitioner provided Schwartzman as a consultant for Respondent. (Pet. App. 42-46; R 0783; 0433-0435; 0659-0661). The agreement contained a mutual no-hire provision:

> *Both parties* agree to not, directly or indirectly, during the period that Consultant [Wilson Solutions] provides services for Client [Anorad] and for a period of one year thereafter, solicit, employ or hire or induce to hire any person who is or has been an employee of *either party* unless otherwise consented to in writing.

(Pet. App. 44; R 0782-0783; 0433-0435; 0659-066) (emphasis added).

On April 19, 1999, Schwartzman sent a letter to Petitioner evincing his intent to resign effective May 7, 1999. (R 0657, 0782). On April 27, 1999, Respondent's representative advised Respondent's employees that Schwartzman had become an employee of Respondent. (R 0781-0782).

Contrary to Respondent's assertions, there has never been any evidence that Petitioner waived the no-hire provision or consented to Schwartzman's hiring.[1] Indeed, as the Fifth Circuit Court of Appeals noted in its opinion:

> It is undisputed . . . that Anorad provided no proof of written consent to the district court and that Schwartzman was hired within one year of his resignation from Wilson Solutions. *Therefore, under the agreement's language, Anorad breached the no-hire provision.*

(Pet. App. 4) (emphasis added). Noting that Texas courts had never considered the standard of proof required for an employer to recover lost profit damages based on an at-will employee's potential earnings, and despite its finding that Respondent had breached its agreement with petitioner, the Fifth Circuit held that Petitioner did not sufficiently prove its damages to a reasonable certainty. *Id.* at 6.

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[1] The Agreement required that any such waiver or consent be in writing. (R 0781).

REASONS FOR GRANTING THE PETITION

Review by this Court is warranted to determine the standard of proof required for an employer to recover contract damages based on the potential profits that would have been realized from an at-will employee's future earnings if not for the culpable conduct of another entity. In reviewing this question of first impression in Texas, the Fifth Circuit Court of Appeals improperly considered the measure of damages available to an at-will employee who seeks lost-profit damages after being unlawfully terminated. Consequently, in the absence of an applicable liquidated damage agreement, employers of at-will employees will *never* be able to recover contract damages based on the profits those employees would have earned for the employer, even when – in situations such as that at bar – the loss of the employees result from another party's wrongful conduct.[2]

A. The implications of the Fifth Circuit's holding

The Fifth Circuit correctly noted that Texas law requires lost profit damages to be established with reasonable certainty, and that they may not be awarded based on speculative, uncertain, contingent, or hypothetical evidence. App. Pet. A. at 5. "A plaintiff must adduce evidence from which the jury can reasonably *estimate* the amount of loss." *Id.* (emphasis added).

However, the Fifth Circuit held that Petitioner's damage claim was not sustainable because it required the court to

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[2] Inasmuch as the Fifth Circuit conceded in its opinion that a breach had occurred, the issue of whether the agreement was valid, which was briefed extensively in the trial and appellate courts, is moot for purposes of this petition.

indulge the presumption that Schwartzman, an at-will employee, would have continued to work for Petitioner and would have earned consulting fees for the year in question.[3] *Id.* Thus, the Fifth Circuit held, it would be impossible for Petitioner or any other employer of an at-will employee to *ever* recover lost profit damages, even when a contract involving that employee has been breached by another entity:

> The damages request relies on the assumption that Schwartzman would continue working for Wilson Solutions, earning consulting fees for the year in question. This type of contingency, created by his at-will status, *is impermissible in Texas.*

Id. at 6.

Other jurisdictions have grappled with similar issues, holding that while the question of whether an at-will employee would remain employed is an uncertainty, it need not preclude the awarding of lost profit damages:

> The biggest problem in awarding future damages for the wrongful discharge of an at-will employee is avoiding speculation. With no contract for guidance, it is often difficult, if not impossible, to know how long the employee would have continued to work for the employer. It is well established, however, that "while recovery will be denied if it is speculative and uncertain whether damage has been sustained, recovery will not be denied merely because the

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[3] Petitioner only sought damages in connection with a year of Schwartzman's employment. (Pet. App. 4).

amount of damages is difficult to ascertain."

Smith v. Smithway Motor Xpress, Inc., 464 N.W.2d 682, 688 (Iowa 1991), quoting *Robinson v. Perpetual Servs. Corp.*, 412 N.W.2d 562 (Iowa 1987); *Kempfer v. Automated Finishing*, 564 N.W.2d 692, 704 (Wis. 1997)(Abrahamson, Chief J., concurring) (same). *See also Tadsen v. Praegitzer Indus.*, 928 P.2d 980, 983 (Or. 1996) ("The fact that at-will employment may be terminated for any nondiscriminatory purpose does not necessarily mean that the likely duration of that employment is incapable of proof to the required degree of certainty.") and *Keith v. Mendus*, 661 N.E.2d 26, 33 (Ind. Ct. App. 1996) (at-will employee's future employment is presumed for a "reasonable time" in cases involving damages due the employee) (citation omitted).

The Fifth Circuit's holding releases contracting parties such as Respondent from abiding by their contractual obligations.[4] That is, although Respondent clearly breached its contract with Petitioner – *see* Pet. App. 4 – it is excused from the breach and even enjoys a windfall solely because of Schwartzman's status as an at-will employee.[5] Such a holding

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[4] *See Winter v. Fitness USA Health Spas Corp.*, No. 188648, 1999 Mich. App. Lexis 2668 (Mich. Ct. App. Nov. 12, 1999) at *9 ("[T]he mere fact that future damages may be speculative should not exonerate a wrongdoer from liability."), citing *Riethmiller v Blue Cross & Blue Shield of Michigan*, 390 NW2d 227, 201 (1986).

[5] The Michigan Court of Appeals recently discussed the illogic in the view of a dissenting justice who would treat at-will employment differently from other employment when assessing damages in connection with future employment:

> If one subscribes to the dissent's view regarding future damages as always being speculative when they relate to at-will employment contracts, one wonders whether the

flies in the face of public policy, which requires that contracting parties fulfill the obligations within the contracts they execute.

B. The solution afforded by contract law

In its opinion, the Fifth Circuit analogized Petitioner's damage claim with that asserted by at-will employees who seek to recover for their future lost salary after their (allegedly) wrongful terminations. (Pet. App. 6-8). The court based its holding that Petitioner cannot collect damages for Schwartzman's speculative future earnings on the notion that, had Schwartzman been terminated by Petitioner, he would have been precluded from collecting damages for his future earnings. *Id.* at 8.

The Fifth Circuit failed, however, to note the critical distinction between the instant scenario and the facts in the cases upon which it relied: Respondent breached the no-hire provision of its contract with Petitioner, a fact clearly set forth

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> dissent would reverse case law that allows for more than nominal future damages for at-will employees whose employment is terminated in violation of various civil rights statutes or, for that matter, future damages for a wrongful death claim involving an at-will employee. Future damages for lost wages have traditionally been allowed in situations in which there is no dispute of fact that the injured party was an at-will employee. Simply because damages cannot be ascertained with mathematical certainty does not make them unacceptably speculative. It is for this reason that what damages may reasonably be anticipated is an issue better left for the trier of fact.

Health Call v. Atrium Home & Health Care Servs., 706 N.W.2d 843, 857-58 (Mich. Ct. App. 2005).

by the Fifth Circuit in its opinion, whereas no such breach was found in the cases cited by the appeals court. As such, Petitioner was entitled to contract damages, even though the specific amount of its damages may not be readily ascertainable. Texas courts have embraced this principle of contract law for decades:

> It is impossible to announce with exact certainty any rule measuring the profits the loss for which recovery may be had. The courts draw a distinction between uncertainty merely as to the amount and uncertainty as to the fact of legal damages. Cases may be cited which hold that uncertainty as to the fact of legal damages is fatal to recovery, but uncertainty as to the amount will not defeat recovery. *A party who breaks his contract cannot escape liability because it is impossible to state or prove a perfect measure of damages.*

Southwest Battery Corp. v. Owen, 131 Tex. 423, 427-428 (Tex. 1938) (emphasis added).[6] *See also Texas Sanitation Co. v. Marek*, 381 S.W.2d 710, 714-715 (Tex. Civ. App.–Corpus Christi 1964, no writ)(same). Yet the Fifth Circuit's opinion would allow Respondent to escape liability for this very reason – because it is difficult for Petitioner to prove damages with the certainty the court contends is required, *even though* Petitioner did present evidence of Schwartzman's earnings in his final year of employment for Petitioner (and despite the court's

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[6] *Citing Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927); *Anvil Min. Co. v. Humble*, 153 U.S. 540 (1984); *Crichfield v. Julia*, 147 F. 65, 71 (2nd Cir.), *cert. denied* 203 U.S. 593 (1906); *Shannon v. Shaffer Oil & Ref. Co.*, 51 F. 2d 878 (10th Cir. 1931); WILLISTON ON CONTRACTS, Vol. III, p. 2401.

finding that a breach did, in fact, occur). *See* Pet. App. 4 ("In his final year at Wilsons solutions, Schwartzman earned approximately $441,000 in consulting fees for Wilson Solutions and received a salary of $99,000 for himself.").

Texas courts have held that future profits, while speculative, can be awarded on a fact-driven, case-by-case basis, especially when the business that sustained the breach had been turning a profit at the time of breach. *See, e.g., Lafarge Corp. v. Wolff, Inc.*, 977 S.W.2d 181, 187 (Tex. App.–Austin 1998, pet. denied), citing *Southwest Battery Corp. v. Owen, supra*, at 1099 (holding that pre-existing profits and the pertinent facts and circumstances regarding a business "may be considered in arriving at a just estimate of the amount of profit which would have been made if the defendant had not breached the contract."). *See also Friedman v. Greenberg*, 2001-2 TRADE CAS. (CCH) P73,510 (Tex. App.–Houston [14th Dist.] 2001, pet. denied) (giving finder of fact the discretion to determine the amount of lost profit damages based on speculative testimony from the plaintiff).

Friedman is illustrative. The *Friedman* plaintiff, a commercial debt collection firm, sued the former employees who breached their employment agreements' non-compete and non-solicitation clauses.[7] 2001-2 TRADE CAS. (CCH) P73,510 at 1. The trial court found two of the former employees had breached their employment agreements and that all three former employees and the company they formed, which also had been

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[7] Cases involving breaches of non-compete clauses may be instructive, as the amount of actual damages is rarely certain in litigation involving a breach of a covenant not to compete. *Gill v. Guy Chipman Co.*, 681 S.W.2d 264, 270 (Tex. App. San Antonio 1984, no writ) (citation omitted). "In such cases, a party is not denied all right of recovery but the amount of damages is fixed by the fact finder in the exercise of sound discretion." *Id., citing Texas Sanitation Co., Inc. v. Marek, supra*, at 715.

sued, had tortiously interfered with the plaintiff's prospective contractual relationships. *Id.* at 5. The jury awarded the plaintiff damages for the contract and tortious interference claims. *Id.* In affirming the award, the Texas appellate court discussed the standard for proving lost profit damages, noting that the Texas Supreme Court has expressed a desire that proof of lost profits be "flexible enough to accommodate the myriad circumstances in which claims for lost profits arise." *Id.* at 19-20, citing *Texas Instruments, Inc. v. Teletron Energy Mgmt., Inc.*, 877 S.W.2d 276, 279 (Tex. 1994). The determination of lost profits must be fact-intensive:

> A jury may not arbitrarily assess an amount neither authorized nor supported by the evidence presented at trial. In other words, a jury may not "pull figures out of a hat;" a rational basis for the calculation must exist. A jury, however, has the discretion to award damages within the range of evidence presented at trial.

Friedman, 2001-2 TRADE CAS. (CCH) P73,510 at 21 (internal citations omitted).

The *Friedman* jury awarded $162,500 in lost profits for the contract and tortious interference claims, apparently disregarding the plaintiff's testimony that its losses were $865,408 for the employees' breaches or, alternatively, $950,374 based on the gross receipts of the year the employees left the plaintiff's employ. *Id.* at 21-22. Although it was unclear how the jury arrived at the $162,500 award, the court noted the jury "has the discretion to award damages within the

range of the evidence presented at trial." *Id.*[8] In the same vein, the Fifth Circuit had the discretion to award damages to Petitioner based on the range of evidence presented regarding its expected profits if not for Respondent's breach.

Finally, it is manifest that the Fifth Circuit's opinion contravenes Texas' long-established public policy, which embraces the creation and enforcement of contracts. "We have long recognized a strong public policy in favor of preserving the freedom of contract." *Lawrence v. CDB Servs., Inc.*, 44 S.W.3d 544, 553 (Tex. 2001). *See also Wood Motor Co. v. Nebel*, 238 S.W.2d 181, 185 (Tex. 1951):

> If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider -- that you are not lightly to interfere with this freedom of contract.

(quoting *Printing and Numerical Registering Co. v. Sampson*, 19 L.R.-Eq. 462, 465 (1875)).

In sum, the Fifth Circuit Court of Appeals' opinion unfairly rewards contracting parties that breach contracts

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[8] The damage analyses in cases involving covenants not to compete and other contracts claims in which damages are speculative are analogous to the case at bar, clearly more so than those cases brought by at-will employees who seek to recover for their own termination. *See supra*, note 7.

involving at-will employees; provides a windfall to the breaching parties; and contravenes established public policy that encourages the formation of contracts by consenting parties. Therefore, Petitioner asserts its petition for writ of certiorari should be granted and briefing requested on the merits.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

1. Opinion issued by United States Court of Appeals for the Fifth Circuit, Cause No. 04-21015, *Blase Industries Corp., d/b/a Wilson Solutions v. Anorad Corp.* on March 1, 2006.

2. Memorandum and Opinion issued by U.S. District Judge Lee Rosenthal, Southern District of Texas, Cause No. H-03-2369 on September 28, 2004.

3. Memorandum and Opinion issued by U.S. District Judge Lee Rosenthal, Southern District of Texas, Cause No. H-03-2369 on December 3, 2004.

4. Mutual Agreement containing, *inter alia*, no-hire clause, executed on April 9, 1998 by Petitioner and Respondent.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-21015

BLASE INDUSTRIES CORPORATION, doing business as WILSON SOLUTIONS,

Plaintiff - Appellant,

v.

ANORAD CORPORATION; ET AL.

Defendants
ANORAD CORPORATION

Defendant - Appellee.

Appeal from the United States District Court
for the Southern District of Texas, Houston

Before BENAVIDES, STEWART, and OWEN, Circuit Judges.
BENAVIDES, Circuit Judge:

This is an appeal from a grant of summary judgment. The district court based its decision on its finding that a no-hire agreement between the parties was unenforceable. The parties principally present arguments to assist the court in predicting how the Texas Supreme Court would analyze the no-hire provision at issue. We, however, choose to affirm the district court on alternative grounds argued by the Appellee. Because the Appellant did not prove its lost profit damages to a reasonable certainty, as required in Texas, summary judgment was appropriate, and the district court is AFFIRMED.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Appellant, Wilson Solutions, *is* a computer software consulting company, and the Appellee, Anorad, is a manufacturer. Wilson Solutions hired Jason Schwartzman in April 1997 to work as one of its consultants. One year later, it entered into a contract with Anorad to provide consulting services at a daily fee of $2000. The contract contained a no-hire provision.[9] It stated:

> Both parties agree to not, directly or indirectly, during the period that Consultant [Wilson Solutions] provides services for Client [Anorad], and for a period of one year thereafter, solicit, employ or hire or induce to hire any person who is or has been an employee of either party unless otherwise consented to in writing.

The parties also agreed that Texas law would govern the contract. In April 1998, Wilson Solutions placed Schwartzman as a consultant for Anorad. Schwartzman *was* not aware of the no-hire provision and did not consent to it.

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[9]A no-hire provision is an agreement between two employers that prohibits one employer from hiring the other employer's employees.

On April 19, 1999, Schwartzman sent Wilson Solutions a resignation letter. The letter stated that he wanted "to pursue more stable positions . . with less travel" and "to move back into the corporate world—with structure, guaranteed bonus, benefits, and pensions." After Schwartzman resigned, Anorad's chief financial officer, Paul Rossi, spoke with Wilson Solutions to **ask** if the company would object if Anorad hired Schwartzman. Wilson Solutions did not provide consent. Nevertheless, on April 26, 1999, Anorad sent Schwartzman a letter offering him employment. On April 27, 1999, Rossi announced to all Anorad employees that Schwartzman had become the company's new director of information systems.

The parties dispute whether Anorad offered Schwartzman a position before Schwartzman resigned from Wilson Solutions. They also dispute whether Wilson Solutions agreed to a modification of the no-hire agreement. It is undisputed, however, that Anorad provided no proof of written consent to the district court and that Schwartzman was hired within one year of his resignation from Wilson Solutions. Therefore, under the agreement's language, Anorad breached the no-hire provision.

Wilson Solutions seeks lost profit damages for the first year Schwartzman worked for Anorad. Wilson Solutions is seeking $341,000. This figure comes from an estimate of what Schwartzman would have earned in consulting fees ($450,000) minus his salary ($99,000) and overhead expenses (approximately 10t). In his final year at Wilsons Solutions, Schwartzman earned approximately $441,000 in consulting fees for Wilson Solutions and received a salary of $99,000 for himself.

Wilson Solutions filed this suit on April 30, 2003—four years after Anorad hired Schwartzman on April 26, 1999. Schwartzman left Anorad on December 31, 2000. Wilson Solutions is only seeking money damages because it could not seek injunctive relief due to the date of its filing. The district

court granted summary judgment to Anorad on September 29, 2004 on grounds that the no-hire provision was unreasonable and, therefore, unenforceable.

II. STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de *novo*, applying the same standards as the district court. *Hirras* v. *Nat'l R.R. Passenger Corp.*, 95 F.3d 396, 399 (5th Cir. 1996). The evidence should be viewed in the light most favorable to the nonmoving party, and the record should not indicate a genuine issue as to any material fact. *Am. Home Assurance Co. v. United Space Alliance*, 378 F.3d 482, 486 (5th Cir. 2004). We may affirm the district court's summary judgment ruling on any ground supported *by* the record. *Lifecare Hosps., Inc.* v. *Health Plus of Louisiana, Inc.*, 418 F.3d 426, 439 (5th Cir. 2005).

III. DISCUSSION

A federal court with diversity jurisdiction must apply the law of the state in which it sits. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 79-80 (1938). No Texas court has examined a damages calculation that exactly mirrors the one at issue, one in which an employer is seeking lost profit damages based on an at-will employee's potential earnings.[10] Nonetheless, Texas courts have examined the ability of an at-will employee, acting on his own behalf, to seek damages based on future earnings. These cases and the general rules for damages in Texas provide sufficient guidance. They show that Wilson Solutions cannot survive the summary judgment challenge.

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[10]This could be a result of the scarcity of no-hire cases in Texas. *See Hosp. Consultants* v. *Potyka*, 531 S.W.2d 657, 665 (Tex. Civ. App. – San Antonio 1975, writ ref'd n.r.e.) ("We know of no case involving a covenant similar to that which we are now considering."). *Hospital Consultants* is the only no-hire case heard by a Texas court.

A. Damages Must Be Proven to a Reasonable Certainty

In Texas, lost profit damages must be established with "reasonable certainty." *Tex. Instruments Incorp. v. Teletron Energy Mgmt.*, 877 S.W.2d 276, 281 (Tex. 1994). Lost profit damages may not be based on evidence that is speculative, uncertain, contingent, or hypothetical. *Carter* v. *Steverson & Co.*, 106 S.W.3d 161, 165-66 (Tex. App.-Houston [1st Dist.] 2003, pet, denied). A plaintiff must adduce evidence from which the jury can reasonably estimate the amount of loss. *Davis* v. *Small Bus. Inv. Co.*, 535 S.W.2d 740, 743 (Tex. Civ. App.-Texarkana 1976, writ ref'd n.r,e.). While some uncertainty as to the amount of damages is permissible, uncertainty as to the fact of damages will defeat recovery. *Id.*

No-hire agreements and covenants not to compete often include a liquidated damages provision to avoid the difficulty of calculating damages. *See, e.g., H PI Commercial Driver Leasing, Inc. v. Fox Valley Containers, Inc.*, 805 N.E.2d 1177, 1184 (Ill. 2004) (no-hire agreement contained liquidated damages clause). These provisions are valid when damages are uncertain and the stipulated sum is reasonable. *Mayhall* v. *Proskowetz*, 537 S.W.2d 320, 322 (Tex. Civ. App.-Austin 1976, writ ref'd n.r.e.). The no-hire provision at issue in the present case did not have a liquidated damages clause.

Wilson Solutions cannot prove to a reasonable certainty the fact that it was damaged by Anorad's breach, The damages request relies on the assumption that Schwartzman would continue working for Wilson Solutions, earning consulting fees for the year in question. This type of contingency, created by his at-will status, is impermissible in Texas. Similarly, a jury would have difficulty estimating the losses suffered by Wilson Solutions. The purpose of lost profit damages it to put the nonbreaching party in the position it would have been *in* had the contract been performed. *Csoba v. Bassichis*, 679 S.W.2d 119, 122 (Tex. App.-Houston [14th Dist.] 1984, writ ref'd n.r.e.). Here, because Schwartzman was an at-will employee, it

is impossible to determine that position with the amount of certainty required by Texas law.

B. At Will Employees Cannot Collect, for Future Lost Salary

"Damages for anticipated lost salary are inappropriate where employment *is* at will." *Allied* Vista, *Inc.* v. *Holt*, 987 S.W.2d 138, 142 (Tex. App.-Houston [14th Dist.] 1999, pet. denied); *see also Ingram v, Fred Oakley Chrysler Dodge*, 663 5.W.2d 561, 562 (Tex, App.-El Paso 1983, no writ) ('When the period of employment *is* left to the discretion of either party .. the loss of wages that the employee would have earned in the indefinite future is not a recoverable item of damages."). In *Allied Vista*, the court reasoned that a lack of certainty in an at-will employee's future work equated to a lack of reasonable certainty in damages. *Id.* (overturning a jury award for lost profits). Intermediate court decisions, like *Allied Vista* and *Ingram*, guide federal courts applying state law. *Herrmann Holdings Ltd. v. Lucent Technologies Inc.*, 302 F.3d 552, 558 (5th Cir. 2002) ("[W]e defer to intermediate state appellate court decisions, unless convinced by other persuasive data that the highest court of the state would decide otherwise.").

Texas courts have acknowledged exceptions to the general rule that at-will employees have no cause of action for termination and, therefore, cannot collect for future earnings. In *Winters v. Houston Chronicle Publishing Co.*, the Texas Supreme Court outlined those exceptions, 795 S.W.2d 723, 724 (Tex. 1990) (refusing to make an exception for at-will employees who are whistle blowers). The court acknowledged several statutory exceptions and two common law exceptions. *Id.* One of the common law exceptions is no longer good law, making the only common law exception "where an employee *is* terminated solely because he refused to perform an illegal act." *Thompson v. El Centro del Barrio*, 905 S.W.2d 356, 358 (Tex. App.-San Antonio 1995, writ denied). The court's unwillingness to expand these exceptions and the lack of a relevant statutory exception show that a Texas court would

likely find that Wilson Solutions cannot base its damages calculation on the future earnings of an at-will employee.

This Court considered when an at-will employee can collect damages for lost profits in *Zenor* v. *El Paso Healthcare System, Ltd.*, 176 F.3d 847, 866 (5th Cir, 1999). We held that the plaintiff, an at-will employee, could not collect for future wages. *Id. ("[He]* could not have proven that he was entitled to any future earnings because he had no guarantee of future employment."). *Id.* This uncertainty stems, in part, from the fact that an at-will employee can be "terminated at any time for any lawful reason." Id.

If Wilson Solutions had terminated Schwartzman, he would not have been able to collect damages for his future earnings. Likewise, Wilson Solutions cannot collect from Anorad based on Schwartzman's speculative future earnings. Schwartzman could have left Wilson Solutions at any point during the year in question,and, in fact, did leave the company.[11] Therefore, any consulting fees Schwartzman would have potentially received are too uncertain to serve as the basis for Wilson Solution's request for damages.

C. No Disputed Facts Are Material

The record reveals two disputed facts relating to the damages calculation: whether Wilson Solutions would have had any work for Schwartzman had he stayed with the company and whether Schwartzman resigned before or after Anorad hired him. The district court found that these issues were material and precluded summary judgment on damages grounds. To the extent that the district court found the disputed

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[11]Schwartzman himself was not precluded from seeking employment, including employment *by* Anorad, as he was not subject to any type of covenant not to compete. In addition, the record suggests that he contemplated leaving Wilson Solutions for reasons independent of Anorad's offer.

facts to be material, we disagree. Taking these facts in the light most favorable to Wilson Solutions, the damages calculation still fails to satisfy the Texas requirement that a plaintiff prove damages to a reasonable certainty. Schwartzman's status as an at-will employee is fatal under these facts and summary judgment is, therefore, appropriate.

IV. CONCLUSION

For these reasons we AFFIRM the district court's granting of summary judgment to Anorad. We do so on the grounds that Wilson Solutions failed to prove its damages to a reasonable certainty as required by Texas law.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BLASE INDUSTRIES CORPORATION d/b/a WILSON SOLUTIONS,	§	
Plaintiff,	§	
vs.	§	CIVIL ACTION NO. H-03-2369
ANORAD CORPORATION	§	
Defendant.	§	

MEMORANDUM AND OPINION

In this suit, Blase Industries d/b/a Wilson Solutions alleges that Anorad Corporation breached a provision in a contract to provide consulting services. Wilson Solutions alleges that Anorad breached the clause prohibiting the contracting parties from hiring the other's employees during the period of the contract and for one year after it ended. The parties have filed cross-motions for summary judgment as to the breach of contract claim. (Docket Entry Nos. 18, 40). The cross-motions turn on whether the no-hire contract provision is enforceable and whether Wilson Solutions has provided sufficient competent summary judgment evidence of damages. Anorad recently deposed two additional witnesses and has supplemented the summary judgment record and moved for summary judgment as to Wilson Solutions's claims of quantum meruit, unjust enrichment, and bad faith. (Docket Entry Nos. 50, 51, 52). Wilson Solutions responded. (Docket Entry No. 59).

Based on the pleadings; the motions and responses; and the applicable law, this court grants Anorad's summary judgment motion, finding that the no-hire contract provision is

overbroad and cannot be the basis of a damages award. In the event that the contract could be enforced, the fact issues as to whether the contract was modified to allow the hiring to occur, and whether Wilson Solutions sustained any damages, would preclude this court from granting Wilson Solutions's motion for summary judgment. The reasons for these rulings are set out below.

I. Background

In April 1997, Wilson Solutions, a computer software consulting company, hired Jason Schwartzman as an at-will employee. On April 9, 1998, Anorad, a manufacturing company, and Wilson Solutions entered into an agreement under which Wilson Solutions would provide computer software consulting services to Anorad for a daily fee of $2,000. (Docket Entry No. 18, Ex. B). The parties agreed that their relationship was that of independent contractor. Under the contract, the parties agreed not to disclose each others' confidential information; that any ideas or methodologies Wilson Solutions created were its property; that Anorad had the right to use any ideas or methodologies Wilson Solutions created; that Wilson Solutions would diligently perform its consulting services, and that the contract would be construed under Texas law. *(Id).* The contract also contained a "no-hire" provision, which stated as follows:

> Both parties agree to not, directly or indirectly, during the period that Consultant [Wilson Solutions] provides services for Client [Anorad], and for a period of one year thereafter, solicit, employ or hire or induce to hire any person who is or has been an employee of either party unless otherwise consented to in writing.

(Id). The agreement was signed by Paul Rossi, chief managing officer for Anorad, and Gaynell Wilson, the chief executive officer and presently the only officer or employee of Wilson Solutions. In April 1998, Wilson Solutions placed Jason

Schwartzman at Anorad, to work under the consulting services contract. (Gaynell Wilson Depo., Docket Entry No.41, Ex. A, p. 64). Wilson Solutions had paid Schwartzman $99,000 in annual salary and billed Anorad for his consulting services at a rate of $2,000 per day.

On April 19, 1999, Schwartzman sent Wilson a resignation letter. He cited as his reasons the desire "to pursue more stable positions. . . with less travel" and "to move back into the corporate world - with structure, guaranteed bonus, benefits, and pensions."(Docket Entry No. 41, Ex. 2). In April or May 1999, Rossi called Wilson to ask whether Wilson Solutions would object if Anorad hired Schwartzman. (Affid. of Gaynell Wilson, Docket Entry No. 18, Ex. A; Wilson Depo., Docket Entry No. 41, Ex. A, pp. 76-77). Wilson declined to consent. Instead, she told Rossi that Anorad would have to wait one year to hire Schwartman or breach the agreement. *(Id).* Rossi offered, and Wilson refused, a $25,000payment that Rossi characterized as a "[finder's fee" to compensate Wilson Solutions if Anorad hired Schwartzman. *(I d.).*

On April 26, 1999, Anorad sent Schwartzman a letter offering him employment. (Docket Entry No. 18, Ex. C). On April 27, 1999, Rossi announced to all Anorad employees that Schwartzman had joined Anorad as its new director of information systems. *(Id).* The parties dispute whether Schwartzman had already left Wilson Solutions before Anorad offered him a position. The parties have not been able to produce written consent by Wilson Solutions to Anorad's employment of Schwartzman. (Wilson Affid., Docket Entry No. 18,Ex. A). It is undisputed that by hiring Schwartzman within one year after Wilson Solutions provided services under the contract, Anorad breached the contractual no-hire provision. After the parties located and deposed Rossi and Schwartzman, Anorad submitted supplementary summary judgment evidence that Wilson Solutions had expressly agreed to allow Anorad to hire Schwartzman, modifying the no-hire provision. According to the recently filed summary judgment evidence, Wilson Solutions agreed to modify the contract in

writing and waive the one-year hiring provision. Wilson Solutions would allow Anorad to hire Schwartzman, but two to four months later, during which time Anorad would continue to pay Wilson Solutions the $2,000 daily consulting fee for Schwartzman's services. There is a dispute between the summary judgment evidence submitted by Wilson Solutions, in the form of Wilson's affidavit, and the Rossi and Schwartzman deposition excerpts. Wilson Solutions denies any consent to Anorad's hiring Schwartzman; Anorad asserts and presents summary judgment evidence that the parties expressly modified the no-hire provision and obtained Wilson Solutions's consent to the hiring.

Schwartzman worked directly for Anorad until December 31, 2000. (Docket Entry No. 18, Ex. C). Anorad paid Schwartzman $125,000 in annual salary as an employee, a considerable savings over what Anorad had paid Wilson Solutions for Schwartzman's services as a consultant.

The threshold issue is the enforceability of the no-hire provision as a basis for damages.

II. The Legal Standard for Summary Judgment

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56. Under Rule56(c), the moving party bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322,(1986); *Stahl* v. *Novartis P rns. Corp.*, 283 F.3d 254, 263 (5th Cir. 2002). The party moving for summary judgment must demonstrate the absence of a genuine issue of material fact but need not negate the elements of the nonmovant's case. *Exxon Corp.* v. *Oxxford Clothes, Inc.*, 109 F.3d 1070, 1074 (5th Cir. 1997). If the moving party fails to meet its initial burden, the motion for summary judgment must be denied, regardless of the nonmovant's response. *Baton*

Rouge Oil and Chem. Workers Union v. *ExxonMobil Corp.*, 289 F.3d 373,375 (5th Cir. 2002).

When the moving party has met its Rule 56(c) burden, the nonmovant cannot survive a motion for summary judgment by resting on the mere allegations of its pleadings. *See Prejean* v. *Foster*, 227 F.3d 504,508 (5th Cir. 2000). The nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *See id.* The nonmovant must "do more than simply show that there is some metaphysical doubt as to the material facts." *Webb* v. *Cardiothoracic SurgeryAssocs.*, 139 F.3d 532,536 (5th Cir. 1998) (citing *Matsushita Elec. Indus. Co., Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). "The mere existence of a scintilla of evidence in support of the plaintiffs position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986).

In deciding a summary judgment motion, the court reviews the facts drawing all reasonable inferences in the light most favorable to the nonmovant. *Id.* at 255; *Cabal* v. *Calendar Oldsmobile, Inc.*, 288 F.3d 721,725 (5thCir. 2002). "RuleS6 *'mandates* the entry of summary judgment, after adequate time for discovery, and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Little* v. *Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (quoting *Celotex*, 477 U.S. at 322).

III. The No-Hire Provision

A. A Covenant Not to Compete or an Agreement Between Two Businesses?

Anorad contends that the no-hire provision is a covenant not to compete and unenforceable under the Texas Covenant Not to Compete Act. Wilson Solutions responds that the no-hire provision is a contract between two businesses imposing

a limit that reasonably protects legitimate business interests. The parties agree that the Texas courts have not addressed a similar contract since Texas passed its Covenant Not to Compete Act.

The only Texas case to address such a no-hire provision is *Hospital Consultants, Inc.* v. *Potyka*, 531 S.W.2d 657 (Tex. Civ. App.-San Antonio 1975, writ ref'd n.r.e.). In that case, the defendant doctor and his corporation had a contract with the defendant hospital to provide medical staff for the hospital's emergency room. The contract provided that, during the term of the staffing contract and for three years thereafter, the hospital would not hire any emergency room physician who had been supplied to the hospital under the staffing contract. *Id* at 659. The hospital elected not to renew the staffing contract with the defendant doctor and entered into a new staffing contract with a rival provider of emergency physician services. *Id* at 660. The new provider then hired the plaintiff emergency room physicians, who were former employees of the defendant doctor, so that they could continue to staff the defendant hospital's emergency room. The defendant hospital, fearing liability for violating the no-switching clause, refused to accept the plaintiff physicians. *Id* These physicians sued both the defendant doctor and the defendant hospital, attacking the validity of the no-switching clause. The court noted that the covenant was "quite different from the ordinary post-employment restriction," because it was an agreement by an employer, rather than on an employee. *Id* at 663. The court noted its concern over upholding the restraint as reasonable when it would affect someone who did not acquiesce and who received no apparent benefit. *Id.* at 665. Using a reasonableness analysis, the Texas court sided with the plaintiffs, holding that the no-switching clause was unenforceable under the common law of restraints of trade because it was more onerous than was reasonably required to protect the parties' legitimate business interests. The court stated that because the plaintiff emergency room physicians had no "customer contact" with the hospital's management, there was no opportunity for them to pirate the defendant doctor's customer (the hospital). Nor was there any

evidence that the emergency room physicians had access to trade secrets or confidential information that could support such a restriction. The restriction was overbroad because it was not limited to restraining the defendant hospital from hiring a physician under contract to the defendant doctor who had worked in the hospital. Rather, the contract prevented the defendant hospital from hiring any physician who had been under contract with the defendant doctor, even if that physician had not worked in the defendant hospital's emergency rooms. *Id* Because the restriction could not be justified by the need to protect the contracting parties from losing a customer or from losing trade secrets or confidential information, the only effect was to insulate the defendant doctor from competition. Such a justification made the restraint unreasonable. *Id.*

The court in *Hospital Consultants* did not discuss whether the contract between the defendant doctor and the defendant hospital was similar to a covenant restraining an employee from competing with his employer following the end of the employment. The court assumed that although the physicians and the defendant doctor were in a contractor subcontractor relationship, "the rule applicable to a subcontractor's agreement not to compete are the same as those applicable to an agreement by an employee not to complete with his employer." *Id.* at 661. The court applied the rule that "[a] covenant restraining an employee from competing with his employer on termination of the employment is valid if it is reasonable in view of the circumstances of the particular case." *Id.* at 661. The court also applied a reasonableness analysis to the no-hire provision in the contract between the hospital and doctor, but did not equate that provision to an employee's postemployment covenant not to compete.[12]

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[12] A similar arrangement was upheld in *Webb v. West Side District Hospital*, 144 Cal. App.3d 9467(2d Dist. 1983). A doctor contracted with a hospital to place physicians in the hospital's emergency room. The contract restricted the hospital from hiring any physician provided by the doctor who had worked at the hospital, unless the hospital paid a fee to the

Anorad cites *Olander* v. *Compass Bank*, 172 F.Supp.2d 846,851 (S.D. Tex. 2001); *Miller Paper* v. *Roberts Paper Co.*, 901 S.W.2d 593,599-600 (Tex. App. - Amarillo 1995, no pet.); and *La. Transp., Inc.* v. *Race*, 2002 WL 32334400 (N.D. Tex. 2002), to support its contention that Texas courts would treat a no-hire clause as a covenant not to compete. Each of the cases Anorad cites, however, involves a covenant between an employer and an employee, as opposed to a mutual no-hire provision between two employers. *See Olander*, 172 F.Supp.2d at 848; *Miller Paper*, 901 S.W.2d at 599-600; *La. Transp.*, 2002 WL at * 1.

The courts of several states have considered the enforceability of no-hire or no switching provisions similar to that in the present case. These courts have reached divergent results. In *Heyde Coso Inc.* v. *Dove Healthcare, L.L.C.*, 654 N.W.2d 830 (2002), the Wisconsin Supreme Court held that a no-hire provision agreed to between employers, without the knowledge and consent of the affected employees, was an unenforceable covenant not to compete subject to a Wisconsin statute that codified the common-law test of reasonable time, territory, and scope restraints generally applied to such covenants.[13] In that case, Dove Healthcare, a health care

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doctor. The *Webb* case upheld this provision because it only applied to physicians who had actually worked at the hospital. The contract provision did not go beyond what was necessary to protect the doctor's economic interest in preventing the physicians from "stealing" the hospital as a customer.

[13] Wis. Stat. § 103.465 (1999-2000) provides as follows:

> **Restrictive covenants in employment contracts.** A covenant by an assistant, servant or agent not to compete with his or her employer or principal during the term of the employment or agency, or after the termination of that employment or agency, within a specified territory and during a specified time is lawful and enforceable only if the restrictions imposed are reasonably necessary for the

provider that operated nursing homes, and Greenbriar Rehabilitation, which provided physical therapists to nursing home facilities, entered into an agreement under which Greenbriar would place physical therapists at one of Dove's facilities. *Heyde*, 654 N.W.2d at 832. The physical therapists placed at Dove remained at-will employees of Greenbriar. The agreement prohibited Dove from hiring Greenbriar therapists during the contract period and one year after it ended. Shortly after Dove terminated the agreement, Dove hired one current and three former Greenbriar employees. *Id.* Greenbriar sued for breach of contract. The Wisconsin Supreme Court determined that the no-hire provision between the two employers served as a restrictive covenant on the affected employees:

> While a covenant not to compete is typically made between an employer and its employees, it is possible, as illustrated in this case, that a restrictive covenant may be made between employers that acts as a covenant not to compete on the employees. . .. [T]he fact that Greenbriar attempts to restrict its employees through a no-hire provision with Dove instead of a restrictive covenant with its employees does not change the underlying analysis. The *effect* of the no hire provision is to restrict the employment of Greenbrier's employees; it is inconsequential whether the restriction is termed a 'no-hire' provision between Dove and Greenbriar or a 'covenant not to compete' between Greenbriar and its employees.

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protection of the employer or principal. Any covenant, described in this subsection, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.

Id at 834. The court noted two of the concerns identified in *Hospital Consultants, Inc.* v. *Potyka:* the no-hire agreement was not limited to forbidding former Greenbrier employees who had worked at a Dove facility from working directly for Dove. Instead, the restriction extended to any former Greenbriar employee, even if they had not worked at a Dove

location. *Id* at 836. The court found that this arguably amounted to an unreasonable territorial restriction. The court also found that the agreement was invalid as contrary to the Wisconsin statute governing covenants not to compete, because it restricted employees who neither knew of or consented to the limit on their ability to work. "At the very least, [Wis.Stat.] § 103.465 requires that employees know that they are subject to a restrictive covenant and that they consent to such a restriction." *Id.* A vigorous dissenting opinion rejected the premise that the no-hire provision acted a restrictive covenant on Greenbriar's employees:

> Greenbriar's at-will employee therapists were...perfectly free to leave Greenbriar at any time and sell their services anywhere in the marketplace, even in competition with Greenbriar, and even to Greenbriar's customers. Greenbriar's customer, Dove, was contractually required to obtain Greenbriar's consent should it wish to hire any Greenbriar employee, and further required to compensate Greenbriar according to the terms of the contract if it did so. The no-hire provision conferred rights and imposed obligations on supplier and customer, not employer and employee. It therefore cannot be construed to be - or even to "act as" - an employee covenant not-to-compete. . . .

Id. at 840. The dissent concluded that the majority's analysis would make all no-hire provisions unenforceable and failed to recognize the need to protect "investments in employee recruitment and training against poaching by their customers."

Id. at 843. The dissent recognized the similarities between a noncompete agreement between businesses and a no-hire agreement between a supplier and its customers and suggested applying the same reasonableness analysis to determine enforceability. *Id.* Under that approach, a court would ask whether the agreement was reasonably necessary to protect the beneficiary; whether it was reasonable as between the parties, considering the time, space, purpose, and scope of the agreement, and whether it was "specially injurious" to the public. *Id.*

In *Therapy Services, Inc.* v. *Crystal City Nursing Center, Inc.*, 389 S.E.2d 710 (1990), the Virginia Supreme Court upheld the validity of a similar no-hire provision, holding that it did not constitute a covenant not to compete. The contract at issue provided that Therapy Services would furnish personnel for skilled rehabilitative services to Crystal City and prohibited Crystal City from hiring Therapy Services employees during the contract and for six months after it ended. *Crystal City*, 389 S.E.2d at 711. Crystal City terminated the agreement and sought to hire Therapy Services employees. *Id* In a subsequent breach of contract suit, Crystal City challenged the no-hire clause, contending that it was against public policy because it was a covenant not to compete that restricted employees without their consent or knowledge. The trial court found the no-hire clause unenforceable. The Virginia Supreme Court disagreed. The court found that the provision was a contract in restraint of trade, rather than a covenant not to compete or restrictive covenant:

> Although the provision in question involves an employee's ability to secure future employment, it is neither a covenant not to compete nor a restrictive covenant between employer and employee. It is a contract between two businesses wherein one business agrees to provide rehabilitative services to patients of the other. As part of the agreement, one party agrees to forego the ability to hire certain people who are not

> parties to the contract. As such, it is a contract in restraint of trade and will be held void as against public policy if it is unreasonable as between the parties or is injurious to the public.

Id. The court concluded that the restraint was not overly broad because it restricted affected employees from seeking employment only with Crystal City. *Id.* at 712. The court also found that the provision afforded fair protection to Therapy Service's legitimate interest in maintaining professional personnel in its employ, noting that, without such a clause, Therapy Services "would become an 'involuntary and unpaid employment agency' for Crystal City."*Id.* at 711-12. The court stated that the provision did not infringe the employees' right to earn a livelihood or adversely impact the public interest:

> The right to earn a livelihood is embraced in the constitutional concept of "liberty." However, this right is conceptually and practically distinct from a claim of a right to specific employment. Neither Crystal City nor the trial court has cited any authority for the proposition that individuals have a right to employment by an employer of their choice or by any specific employers. The evidence indicated that in the Northern Virginia area, therapists were in low supply and in high demand and, thus, should they choose to leave Therapy Services' employ, they could secure like positions in the area.
>
> Similarly, there was no adverse impact on the interest of the public at large. The availability of therapists' services was not diminished since the affected therapists were not precluded from working in Northern Virginia or any other area. Under these circumstances we cannot conclude that paragraph 13 deprived the affected therapists of the "right to seek a livelihood" or that it interfered "with the interest of the public."

Id (internal citations and quotations omitted).

The court in *Heyde* distinguished *Crystal City* on the grounds that the agreement in *Crystal City* restricted employees from working with only one employer.

> Importantly, the *[Crystal City]* court concluded that the "restriction is reasonable. . . because it does not in any way inhibit the affected employees from seeking employment as therapists with any employer other than Crystal City." In this case, the employment opportunities of the Greenbriar employees are restricted with respect to *all* of the facilities that Greenbriar has a contract with, even if an employee has never worked at any of the other facilities except for Dove.

Heyde, 654 N. W.2d at 837 (internal citations and quotations omitted) (emphasis in original).

Recently, in *H & M Commercial Driver Leasing, Inc.* v. *Fox Valley Containers*, 805N .E.2d 1177 (Ill. 2004), the Illinois Supreme Court upheld the validity of a no-hire provision between employers, finding that it did not constitute a covenant not to compete. In *Fox Valley*, a truck-driver lessor brought suit against a truck-driver lessee for breach of a contract that prohibited the lessee from hiring leased drivers for one year following contract termination. The court found that the provision was neither a covenant not to compete nor a restrictive covenant between an employer and employee, but rather a restraint of trade between employers, which would be analyzed for reasonableness. The court explained as follows:

> This is not a case where the employee is arguing that he or she has been foreclosed from employment. In our view, the provision at issue restricted one employer's ability to hire former employees of the other employer. Thus, as the Virginia Supreme Court recognized [in *Crystal*

> *City]*, the contract provision acts as a restraint on trade.

Fox Valley, 805 N.E.2d at 1183. The court concluded that the employer was protecting its legitimate business interest in not serving as "'an involuntary and unpaid employment agency,'" *id* at 1184 (quoting *Crystal City*, 389 S.E.2d at 712), and that the restriction on the affected employees was minimal:

> [Plaintiff] argues that [the provision] is reasonable, as it protects its sole business asset, its drivers, from being hired away by its customers. If customers could hire [plaintiff's] drivers on a permanent basis, then they would no longer need [plaintiff's] services. We agree that this is a legitimate interest and that [the provision] affords fair protection to that interest. It is important to note that, under the provision, [plaintiff's] employees are not restricted from seeking employment as drivers with any employer other than [defendant]. [Defendant] is not restricted from hiring all [plaintiff's] employees, just those who had been provided to [defendant] from [plaintiff].

Id.[14]

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[14] In *Club Properties, Inc. v. Atlanta Offices-Perimeter, Inc.*, 348 S.E.2d 919 (1986), the contractual provision at issue was a liquidated damages clause in a lease, which provided for a monetary payment if the lessee should hire any of the lessor's skilled employees. The court struck down the no-hiring clause under the common law of restraints of trade, after examining it under the same test of reasonableness with respect to time, territory, and scope as it would have applied to an employee covenant not to compete. The court reasoned that there is "no meaningful difference" between a no-hiring ban and a covenant not to compete. *Id* at 921.; *see also AL. Williams & Associates v. Stalk*, 960 F.2d 942 (11th Cir. 1992), *vacated by consent of parties*, 984 F.2d 391 (11th Cir. 1993).

This court's task is to determine whether the Texas Supreme Court would enforce the mutual no-hire provision in the contract at issue. The no-hire provision is an agreement between businesses that are not in a competitive relationship, but instead in a relationship of customer and supplier of services, not to hire each other's employees. Wilson Solutions argues that by definition, the no-hire agreement cannot be a covenant not to compete because Anorad and Wilson Solutions are not competitors, but customer and supplier. That argument understates the restraint on competition that is present and the breadth of the Texas statute governing covenants not to compete. When Anorad agreed not to hire a Wilson Solutions software consultant as a direct employee, Anorad agreed not to compete with Wilson Solutions in providing such software services by hiring a Wilson Solutions employee. Conversely, when Wilson Solutions agreed that it will not hire an Anorad employee, Wilson Solutions agreed not to compete with Aborad's in-house provision of software related services and expertise by hiring away an Aborad employee.

A no-hire provision in an agreement between businesses is clearly different than a covenant between an employer and employee not to compete or not to solicit customers or other former employees after the period of employment ends. But the Texas Covenants Not to Compete Act is not limited to such promises between an employer and an employee. Unlike the Wisconsin statute at issue in *Heyde*, the Texas statute is not limited to "restrictive covenants in employment contracts," or limits on agreements to provide personal services, but instead covers a broad range of covenants not to compete. Tex. Bus. & Com. Code Ann.§ 15.50 (Vernon 2004) (providing criteria for enforceability of "covenants not to compete"under common law or otherwise); *Norlyn Enterprises, Inc.* v. *APDP, Inc.*, 95 S.W.3d 578(Tex. App.-Houston [1 Dist.], 2002, no pet.)(franchise agreement); *Natal Café Services, Ltd* v. *Pederast*, 2004 WL 1746884 (Tex.App.-Waco, pet. filed) (partnership agreement); *Vail Arms, Inc.* v. *Vail*, 2004 WL 1903255 (5th Cir. 2004) (buy-sell agreement).

Even the cases that dispute characterizing a no-hire provision as an indirect restriction on an employee's ability to work recognize such a provision as a restraint on trade. *See Therapy Services, Inc.* v. *Crystal City Nursing Center, Inc.*, 389 S.E.2d at 712 (recognizing that no-hire provision is an agreement not to hire certain people who are not parties to the contract and, as such, a contract in restraint of trade that is enforceable only if reasonable and not injurious to public); *Heyde Coso* v. *Dove Healthcare*, 654 N.W.2d at 839-41 (dissenting opinion disputes application of the narrow Wisconsin statute relating to employment contracts with covenants not to compete and would apply common law on restraint of trade); *H & M* v. *Fox Valley*, 805 N.E.2d 1177 (no-hire provision is a restraint on trade, not a general covenant not to compete or restrictive covenant between employer and employee).[15]

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[15] *In Dyson Conveyor Main. Inc. v. Young & Vanned Supply Co.*, 529 So.2d 212 (Ala. 1988), a six-month no-switching agreement between two competing employers was ancillary to negotiations between them in contemplation of a possible acquisition. The agreement was held invalid under an Alabama statute, but would have been upheld if the switching employee himself had agreed to a postemployment restriction. The dissent emphasized that the agreement protected the legitimate interests of the two companies while they were divulging to each other the confidential information necessary to enable one to evaluate the business of the other for potential acquisition purposes. In *Communication Technical Systems, Inc.* v. *Dinsmore*, 583 N.W.2d 125 (S.D. 1998), the plaintiff hired out skilled computer programmers on a temporary basis to its customers. The plaintiff entered into an agreement with a customer that during the time the plaintiff was providing services for the customer, and for a period of one year following the termination of such services, the customer would not hire, solicit, or recruit any employee of the plaintiff. The South Dakota Supreme Court ruled that this agreement was invalid because of a broad statutory prohibition against any "contract restraining exercise of a lawful profession, trade, or business" *Id.* at 127. The statute contained an exception for an employee's covenant not to compete with his employer, but the court held that exception to be inapplicable because here the agreement not to recruit was entered into between the plaintiff and its customer, not between the plaintiff and its employee. Both a concurring and dissenting opinion

This court analyzes the provision both under the Texas statute governing covenants not to compete and under the Texas common law used to measure the validity of contractual restraints on trade. Under either, it fails to pass muster as the basis for a damages award.

The Texas Covenants Not to Compete Act added sections 15.50 and 15.51 to the Texas Business and Commerce Code. *See Light v. Cental Cellular Co. of Texas,* 883 S.W.2d642,643 (Tex. 1994). Under the current version of the Act, noncompetition agreements are enforceable as long as the restraints imposed are reasonable as to time, geographical area, and scope of activity restrained, and the agreement is ancillary to or part of an otherwise enforceable agreement. Tex. Bus. & Com. Code Ann. § 15.50(a)[16] The Texas Legislature amended the Act in 1993 and added section 15.52, which provides:

> The criteria for enforceability of a covenant not to compete... and the procedures and remedies provided... are exclusive and preempt any other criteria for enforceability of a covenant not to compete....

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recognized that the holding ignored the companies' valid interest in "preventing their employees from being raided."

5 Section 15.50 of the Texas Business and Commerce Code provides:

> [A] covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.

TEX. BUS. & COM. CODE ANN. § 15.50(a) (Vernon 2004).

Id. § 15.52; *see also Light,* 883 S.W.2d at 643-44. The Texas Supreme Court has interpreted this provision as a clear signal that the Texas Legislature intended the Act to "largely supplant the common law" relating to the enforcement of covenants not to compete. *Light,* 883 S.W.2d at 644. The Act recognizes that restraints should be no greater than "necessary to protect the goodwill or other business interest of the promisee." *See* Tex. Bus. & Com. Code Ann. §§ 15.50(a), 15.51(c). Under the Act, Texas law enforces reasonable restraints on competition that protect legitimate business interests. Enforceability is a question of law for the court. To determine the enforceability of a noncompetition agreement, the court must ask whether the covenant is ancillary to an otherwise enforceable agreement and examine whether the limitations imposed by the noncompete are reasonable and no more restrictive than necessary. *See Light* v. *Cental Cellular Co.,* 883 S.W.2d at 643.

The parties vigorously dispute whether the no-hire provision is ancillary to, or part of, an otherwise enforceable agreement. Standing alone, an at-will employment relationship does not constitute an otherwise enforceable agreement because it is not binding. *Martin* v. *Credit Proto Assen, Inc.,* 793 S.W.2d 667,669 (Tex. 1990); *Alex Sheshunoff Mgmt.. Servs.* v..*Johnson,* 124 S. W.3d 678, 684 (Tex. App. - Austin 2003, pet. filed). An at-will employment relationship may give rise to an otherwise enforceable agreement if it contains independent consideration that is not dependent on the illusory promise of continued employment. *Light,*883 S.W.2d at 645-46; *Alex Sheshunoj[,* 124 S.W.3d at 684. The point in time relevant to this determination "is *the moment the agreement is made;* the issue is whether, 'at the time the agreement is made,' there exists other mutually binding promises to which the covenant not to compete is ancillary or part and parcel." *CRC-Evans Pipeline Int'l, Inc.* v. *Myers,* 972S.W.2d 259,263 (Tex. App. - Houston [1st Dist.] 1996, no pet.) (emphasis in original); *see also Light,*

883 S.W.2d at 645 n. 6; *Alex Sheshunoff*, 124 S.W.3d at 688. The parties agree that the no-hire provision as applied in this case satisfies the temporal requirements of the Texas Covenant Not to Compete Act, because the contract term is limited to one year after the contract term ends.

The contract is, however, overbroad in a critical respect. The contract is not limited to precluding Anorad from hiring a Wilson Solutions employee who worked at Anorad. Rather, the contract precludes Anorad from hiring any Wilson Solutions employee, including an employee who provided consulting services to a different customer. Similarly, the contract does not merely preclude Wilson Solutions from hiring an Anorad employee who had worked with Wilson Solutions on Anorad's behalf, but precludes Wilson Solutions from hiring any Anorad employee. Under the cases addressing similar contracts, whether as a covenant not to compete or as a more limited restraint on trade, a provision so broad as to cover all employees, rather than those who actually worked for the other contracting party, is unenforceable. *See, e.g., Hospital Consultants* v. *Potyka*, 531 S.W.2d at 657 (holding that the no-hire provision was overbroad because it prohibited the hospital from hiring all physicians formerly employed by the doctor, regardless of whether those physicians had ever actually worked at that hospital); *H & M Commercial Driver Leasing, Inc. v. Fox Valley Containers, Inc.*, 805 N.E. 2d at 1184; *Crystal City*, 380 S.E.2d at 712. Such a clause imposes a greater restraint than is necessary to protect the business interest of the promisee.

Wilson Solutions, whose livelihood depended on its consulting projects, had a legitimate business interest in not becoming an "involuntary and unpaid employment agency"for Anorad. *Id.* at 711-12. Wilson Solutions's brief and Gaynelle Wilson's affidavit state that the risk addressed by the no-hire

provision was that the customer, Anorad, would hire the Wilson Solutions employees working at Anorad on a consulting basis and employ them (at a lower cost) to do the same work. If that occurred, Wilson Solutions would lose the employee and lose the customer. The business interest of Wilson Solutions protected by the no-hire provision is the risk of losing an employee to a particular customer for whom that employee had worked as a consultant. Wilson Solutions asserts that it was also at risk of having Anorad hire other Wilson Solutions employees, all of whom performed the same type of work as Schwartzman. This argument ignores the fact that Anorad had no greater, or different, relationship with other Wilson Solutions employees than any other prospective employer. By contrast, once a consultant has worked at Anorad and developed relationships with Anorad employees and knowledge about Anorad's computer software, both the consultant and Anorad had a relationship that could threaten Wilson Solutions's ability to maintain the consultant as an employee and Anorad as a client. The no validly protect Wilson Solutions's interest if it was limited to the employees of Wilson Solutions who actually worked at Anorad. In April 1998, when the parties entered the contract with the no-hire provision, Wilson Solutions had over fifty employees. Under the broad provision, Anorad could not have hired any of them, even though Schwartzman was the only consultant who worked at Anorad.

Even if a broader provision might be enforceable as a basis for injunctive relief if reformed and applied as limited, such a provision could not be the basis of a damages recovery. In this case, Wilson Solutions waited four years after Schwartzman went to work for Anorad and sought no injunction. Wilson Solutions seeks only damages. *See Butler* v. *Arrow Mirrow & Glass, Inc.*, 51 S.W.3d 787 (Tex. App.-Houston [1st Dist.] 2001, no pet.);*Gen. Devices, Inc.* v. *Bacon,*

888 S.W.2d 497 (Tex. App.-Dallas, writ denied); *Perez* v. *Tex. Disposal Systs., Inc.*, 103 S.W.3d 591,593 (Tex.App.-San Antonio 2003, writ denied) ("If the covenant not to compete does not meet the Section 15.50 criteria and the trial court reforms the covenant, a court may award an employer injunctive relief only. . . .").

If the contract is analyzed as imposing some restraints on competition between businesses which do not directly compete, it is unenforceable because the restraints are greater than necessary to protect a legitimate business interest. The restraint was designed to protect the consulting firm from its client evading the business arrangement and directly hiring consultants at a lower price. The contract imposed a greater restraint than necessary to protect that interest. *See Freund v. E.D. & F Man Int 'Inc..,* 199 F.3d 382,385 (7th Cir.1999) (holding that under Illinois law, an employer can enforce a promise by another employer not to hire away certain employees, provided that the contract does not unreasonably restrain competition between the two employers and survives the"reasonableness" scrutiny of restrictive covenants).

Anorad's motion for summary judgment that the contract is unenforceable is granted.

B. Wilson Solutions's Cross-Motion for Summary Judgment

Wilson Solutions moved for summary judgment. The over breadth of the contract makes it unenforceable and requires that this court deny Wilson Solutions's motion for summary judgment as to the contract claim. In addition, there are disputed fact issues as to whether the contract was modified and whether Wilson Solutions can prove any damages as a

result of Anorad's employment of Schwartzman. Both would require this court to deny Wilson Solutions's cross-motion.

Wilson Solutions argues that because Schwartzman worked for Anorad for more than one year after the termination of the contract between Wilson Solutions and Anorad, Wilson Solutions is entitled to damages, in the form of lost profits, for the entire year. Anorad argues that it is entitled to summary judgment because Wilson Solutions cannot prove damages with a reasonable degree of certainty, or a fact question exists regarding damages.

In his final year with Wilson Solutions, Schwartzman earned his employer income of approximately $441,000 working as a consultant for Anorad (at a rate of $2,000 per day), with a yearly salary of $99,000 and approximately 10 percent overhead. (Docket Entry No. 18, Ex. A). Wilson Solutions contends that if Schwartzman had remained its employee during the following year, Wilson Solutions would have received $450,000 in consulting fees from Anorad, less $99,000 for Schwartzman's salary and ten percent overhead, resulting in a net profit of$341,000. *(See* Docket Entry No. 18, Ex. A, C).

Under Texas law, the standard for calculating damages in breach of contract cases is

> the amount necessary to put the party in the same economic position in which it would have been had the contract not been breached. Generally the measure of damages meeting this standard is net profit. Specifically, the gross amount the nonbreaching party would have received if the contract had been fulfilled should normally be reduced by any unpaid costs the non-breaching

party would have to incur to complete performance of the contract.

DP Solutions, Inc. v. *Rollins, Inc.*, 353 F.3d 421,428-29 (5th Cir. 2003) (internal citations and quotations omitted). This standard is commonly referred to as "lost profit" damages. *See, e.g., Texas Instruments, Inc. v. Teletron Energy Mgmt., Inc.*, 877 S.W.2d276, 279 (Tex.1994); *Szczepanik* v. *First* S. *Trust Co.*, 883 S.W.2d 648,650 (Tex. 1994).

Under Texas law, "lost profits" must be proved with "reasonable certainty." *Info. Communication Corp.* v. *Unisys Corp.*, 181 F.3d 629, 633 (5th Cir. 1999); *Teletron*, 877S.W.2d at 279. "[W]hether lost profits have been proved with reasonable certainty is a fact intensive determination dependent upon the circumstances of the particular case." *Formosa Plastics Corp. USA* v. *Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41,50 n. 3 (Tex.1998). Lost profits may not be recovered where the damages are "too uncertain or speculative. "*Unisys*, 181 F.3d at 633 (quoting *Teletron*, 877 S.W.2d at 279); *see Szczepanik*, 883 S.W.2d at 650 (denying recovery of lost profits where evidence was too speculative); *Holt Atherton* v. *Heine*, 835 S.W.2d 80, 85-86 (Tex. 1992) (same). Factors such as changing market conditions, changing business opportunities, and entry in to unknown or unviable markets may preclude the recovery of lost profits. The determination of "reasonable certainty" is intended to be "flexible enough to accommodate the myriad circumstances in which claims for lost profits arise." *Teletron*, 877 S.W.2d at 279. "At a minimum, opinions or estimates of lost profits must be based on objective facts, figures or data from which the amount of lost profits may be ascertained." *Szczepanik*, 883 S.W.2d at649; *see a/so Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 84 (Tex. 1992). "When a review of the surrounding circumstances establishes that the profits are not reasonably certain, there is no

evidence to support the lost profits award." *Formosa*, 960 S.W.2d at 50n.3.Anorad argues that Wilson Solutions cannot prove lost profits with reasonable certainty because there is evidence showing that Schwartzman, an at-will employee, had already decided to leave Wilson Solutions before he agreed to work for Anorad. In addition, Wilson Solutions provides no evidence that it could have placed Schwartzman with other clients in the year following the termination of the contract between Anorad and Wilson Solutions. Anorad cites Schwartzman's resignation letter, written before he was hired by Anorad, stating that he was leaving the consulting business in order to "pursue more stable positions," have "less travel," "move back into the corporate world," and act in the "interestsof [his] family." (Docket Entry No. 18, Ex. A). Anorad also cites Wilson's deposition testimony as evidence that Wilson Solutions had no place to assign Schwartzman other than Aborad:

> Q: Had Schwartzman not gone to work at Aborad, did you have another available open contract for him to work on? No, not that I recall.
> A: No, not that I recall.
> Q: Okay.
> A: I should change that to "I don't know."
> Q: None that you recall?
> A: Well, the answer would really be - do I know if I had another contract to place him on? The answer is "I don't know."
> Q: As you sit here today, are you able to recall a single one?
> A; As I sit here today, I cannot tell you on any particular date which contracts I had requiring resources.
> Q: Would it be fair to say, then, that as you sit here today, you can't point to a specific contract that

says "if I did not have Jason Schwartzman working at Aborad, I know I could have placed him at this other customer doing this work for that period of time," you can't say that, is that fair?

A: I can't say that I could or could not. I don't recall.

Q: You have no specific memory of a particular contract that was out there that he could have filled is that true?

A: I don't recall.

(Wilson Depo., Docket Entry No. 41, Ex. A, pp. 83-84). Anorad suggests that Wilson Solutions would have lost money if it were paying Schwartzman's salary and overhead with no work for him to do.

Wilson Solutions responds that the circumstantial evidence in this case supports a finding that Anorad terminated the relationship with Wilson Solutions because it hired Schwartzman. Wilson Solutions notes that Aborad presents no evidence that it ever formally terminated the contract and asserts that Aborad did not need Wilson Solutions because it hired Schwartzman - precisely what the no-hire provision was intended to prevent. Wilson Solutions argues that Schwartzman's high skill, as demonstrated by the summary judgment evidence, would have enabled Wilson Solutions to place Schwartzman on another consulting project. Noting the one-week lag time between Schwartzman's letter of resignation and Anorad's offer letter, Wilson Solutions contends that the facts support a finding that Schwartzman left Wilson Solutions because he was solicited by Aborad to become a direct employee.

The disputed fact issues as to whether Schwartzman would have remained a Wilson Solutions employee had he not gone to work for Aborad, whether Wilson Solutions would

have had any work for him had he stayed, and whether Wilson Solutions agreed to allow Aborad to hire Schwartzman, preclude summary judgment as to whether Wilson Solutions is entitled to damages and, if so, in what amount. Wilson Solutions's motion for summary judgment as to its contract claim is denied.

IV. Anorad's Motion for Summary Judgment as to the Extracontractual Claims

Anorad has moved for summary judgment dismissing Wilson Solution's extracontractual claims for breach of an implied contract, breach of the duty of good faith and fair dealing, and quantum meruit.

An implied-in-fact contract "arises from the acts and conduct of the parties, it being implied from the facts and circumstances that there was a mutual intention to contract."*Haws & Garrett Gen. Contractors, Inc. v. Gorbett Bros. Welding Co.*, 480 S.W.2d 607,609(Tex. 1972). A meeting of the minds is an essential element of an implied-in-fact contract. *Texas Ass'n of Counties County Gov't Risk Mgmt. Pool v. Matagorda County*, 52 S.W.3d128, 133 (Tex.2000). In an express contract, mutual agreement is expressly stated; in an implied contract, mutual agreement must be inferred from the circumstances of the transaction. *Buxani v. Nussbaum*, 940 S.W.2d 350, 352 (Tex.App.-San Antonio 1997, no writ). The court "must look to the conduct of the parties to determine the tenus of the contract on which the minds of the parties met." *Williford Energy Co.* v. *Submergible Cable Servs.*, Inc., 895 S.W.2d 379, 385 (Tex.App.-Amarillo 1994, no writ). The conduct and circumstances surrounding the transaction are to be viewed from a reasonable person's interpretation at that particular point in time. *Bank of El Paso* v. *T.O. Stanley Boot Co.*, 809 S.W.2d 279, 284 (Tex.App.El Paso-1991 *rev'd o.g.),*

(citing *Haws & Garrett Gen. Contractors, Inc.*, 480 S.W.2d at 609); *Wal-Mart Stores, Inc.* v. *Lopez*, 93 S.W.3d 548, 557-558 (Tex. App.-Houston [14 Dist.] 2002, no writ).

There is no evidence in the summary judgment record that would permit this court to find an enforceable implied contract that Anorad breached. As a rule, a party may recover under an implied contract only when no express contract exists covering the subject matter. *See Threadgill* v. *Farmers Ins. Exchange*, 912 S.W.2d 264,268 (Tex.App.-Dallas 1995, no writ). The implied contract Wilson Solutions asserts cannot be the basis for a recovery because an express contract exists covering the same subject matter.

Wilson Solutions cannot recover for breach of an implied duty of good faith and fair dealing, as a matter of law. In addition to the overbreadth that makes the contract unenforceable as a basis for a damages award, Texas does not generally imply such a duty in all contracts. The Texas Supreme Court has imposed an actionable duty of good faith and fair dealing only when there is a special relationship, such as that between an insured and his or her insurance carrier. *SeeArnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987). There is no general duty of good faith and fair dealing in employment contracts. *See City of Midland v. O'Bryant*, 18 S.W.3d 209,215 (Tex. 2000).

Wilson Solutions also asserts an implied in law contract, under quantum meruit, asserting that Wilson Solutions is entitled to be paid because it "located and placed a highly qualified computer technician" with Anorad. (Docket Entry No. 58, p. 7). Quantum meruit is an equitable, quasi-contractual remedy that does not arise out of a contract, but is based on the promise implied by law to pay for beneficial services rendered and knowingly accepted. *Vortt Exploration Co. v. Chevron*

U.S.A., 787 S.W.2d 942,944 (Tex. 1990). A contract implied in law may be imposed to avoid unjust enrichment. *Riverside, Inc. v. Gulf States Utilities Co.*, 289 S.W.2d 945,949 (Tex. Civ.App. - Beaumont 1956, writ refd n.r.e.).To establish a claim for quantum meruit, plaintiffs must show (1) they rendered valuable services to the individual sought to be charged, (2) who accepted the services and materials to his benefit, (3) under such circumstances that he would reasonably know that the plaintiffs expected to be paid for the services. *Sourignavong v. Methodist Healthcare Sys. of San Antonio, Ltd.*, 977 S. W.2d 382, 385 (Tex.App - Amarillo 1998, pet. denied) (citing *Bayshore v. Baptist Mammal Hosp. SYS.*, 685 S.W.2d 307,310 (Tex. 1985)).

In the present case, there is no evidence that Wilson Solutions provided a valuable service to Anorad for which Anorad did not pay. It is undisputed that Wilson Solutions charged Anorad $2,000 for each day Wilson Solutions provided Schwartzman as a consultant, and that Anorad paid in full. There is no evidence that when Anorad hired Schwartzman to work as an employee, it did so under circumstances that would support an inference that Wilson Solutions expected to have to continue to pay Anorad the full consulting fee, or some undefined lesser amount as a "finder's fee." To the contrary, as Anorad points out, Wilson Solutions alleges that it expressly refused to accept such a fee in lieu of having Anorad continue to obtain Schwartzman's services as a Wilson Solutions consultant. Wilson Solutions's motion for summary judgment on the extracontractual claims is denied.

IV. Conclusion

Based on the pleadings; the motions and responses; and the applicable law, this court grants Anorad's motion for summary judgment and denies Wilson Solutions's cross-motion

for summary judgment and, by separate order, enters final judgment.

SIGNED on September 28, 2004, at Houston, Texas.

Lee H. Rosenthal

Lee H. Rosenthal
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BLASE INDUSTRIES	§	
CORPORATION d/b/a	§	
WILSON SOLUTIONS,	§	
	§	
Plaintiff,	§	
vs.	§	CIVIL ACTION NO.
	§	H-03-2369
ANORAD CORPORATION	§	
	§	
Defendant.	§	

MEMORANDUM AND OPINION

Blase Industries d/b/a Wilson Solutions sued Anorad Corporation, alleging a breach of a contract to provide consulting services. Wilson Solutions alleged that Anorad breached the clause prohibiting the contracting parties from hiring the other's employees during the period of the contract and for one year after it ended. The parties filed cross-motions for summary judgment as to the breach of contract claim. (Docket Entry Nos. 18, 40). The cross-motions turned on whether the no-hire contract provision was enforceable; whether Wilson Solutions provided sufficient competent summary judgment evidence of damages; and whether Wilson Solutions had specifically agreed to waive the no-hire provision

and allow Anorad to employ a Wilson Solutions consultant. This court granted Anorad' s motion for summary judgment, denied Wilson Solutions's motion, and entered final judgment. Within ten days, Anorad moved for reconsideration or, in the alternative, a new trial.

"A motion to reconsider an order granting summary' judgment is appropriate when the court is presented with newly-discovered evidence, when the court committed clear error, when there is an intervening change in controlling law, or when other highly unusual circumstances exist." *Becerra* v. *Asher,* 921 F. Supp. 1538, 1548 (S.D. Tex. 1996), *aff'd,* 105 F.3d 1042 (5th Cir.), *cert. denied sub nom. Becerra* v. *Houston Indep. Sch. Dist.,* 118 S. Ct. 82 (1997).[1] None of these circumstances is present here. Wilson Solutions either restates the arguments previously addressed to this court or presents evidence that it did not submit before the entry of judgment, despite the earlier availability of the evidence. Wilson Solutions has not stated any grounds for the amendment or alteration of the judgment. *See id.; see also WG. Pettigrew Distrib. Co.* v. *Borden, Inc.,* 976 F. Supp. 1043, 1062 (S.D.

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[1] Wilson Solutions classifies its motion as seeking reconsideration or a new trial. "As no trial was held in the district court, it cannot logically be called a motion for new trial." *St. Paul Mercury Ins. Co. v. Fair Grounds Corp.,* 123 F.3d 336,339 (5th Cir. 1997). The motion is correctly entitled a Rule 59(e) motion to alter or amend judgment. *See id: Patin v. Allied Signal. Inc.,* 77 F. 3d 782, 785 n.1 (5th Cir. 1996); *Lupo v. Wyeth-Ayerst Labs.,* 4 F. Supp. 2d 642, 643 (E.D. Tex. 1997) ("[T]en days after the entry of. . . judgment, [plaintiff] filed a Motion for New Trial. . .. In doing so, he essentially sought reconsideration of the summary judgment ruling on that cause of action pursuant to Federal Rule of Civil Procedure 59(e).").

Tex. 1996), *aff'd* 127 F.3d 34 (5th Cir. 1997).[2] Moreover, this court finds that the evidence that Wilson Solutions now submits would not create a genuine factual dispute on any material issue. Accordingly, Wilson Solutions's motion for reconsideration or a new trial is DENIED.

SIGNED on December 3,2004, at Houston, Texas.

Lee H. Rosenthal

Lee H. Rosenthal
United States District Judge

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[2] Wilson Solutions emphasizes the need for an enforceable no-hire provision. This court did not hold that the no-hire provision in the contract was unenforceable. Rather, this court held that on the basis of the summary judgment record, the no-hire provision was overbroad and could not be the basis of a damages award. The opinion did not address whether, on different summary judgment evidence, the no-hire provision could have been applied as Wilson Solutions argued, or whether the provision could have been used to obtain an injunctive relief to protect the interests Wilson Solution has identified.

WILSON SOLUTIONS
7037 HIGHWAY 6 NORTH, SUITE 260
HOUSTON, TEXAS 77095

April 9, 1998

Paul Possi
Anorad Coporation
110 Oster Avenue
Hauppauge, NY 11788

Re: *Confidentiality*

Dear Mr. Rossi:

The purpose of this letter is to set forth our respective obligations as to out working relationship, and to supplement certain separate agreements that we shall enter into as to individual projects (the "Services"). Both parties acknowledge that the relationship between the parties is one of an independent contractor. The parties to this agreement are Anorad Corporation hereinafter referred to as "Client" and Wilson Solutions hereinafter referred to as "Consultant".

Consultant specifically acknowledges that both parties shall maintain our own information and that of consultants' customers, suppliers and investors in confidence. In performing services for Client, each party may gain access to various confidential information pertaining to the other, the other's customers, suppliers and investors. In such event,

Consultant agrees to maintain all such confidential information that Consultant may learn or acquire in the strictest confidence and that Consultant will not at any time, during the period of the parties' relationship thereafter, use such information or disclose it to another, except as authorized by the other. This obligation of confidence shall continue during the period that Consultant provides services for Client and for a period of three years thereafter. Both parties agree that confidential information does not include information which (i) is or becomes generally available to the public other than as a result of a disclosure by either of the parties, (ii) was within the other party's possession prior to its being finished to such party, or (iii) becomes available to the other on a non-confidential basis from a source other than the disclosing party, provided that such source is not known by us to be bound by a confidentiality agreement or other contractual, legal or fiduciary obligation of confidentiality to such disclosing party.

In connection with providing services to Client, Consultant will be involved in activities which may result in the creation of (i) ideas protected under state law (contract law and laws protecting trade secrets) and the federal patent system, and (ii) forms of expression of ideas covered by the federal copyright laws. It is agreed that Client will have the unrestricted right to use, improve or modify such property i connection with Client's business provided that Client does not separately exploit same. However, all of the work that Consultant creates or develops, solely or jointly with other, relating to the work assigned to Consultant by Client (whether created on Clients premises or at Consultant's offices and whether or not using Client's equipment) will not constitute a "work made for hire" and that Consultant will be the owner of all rights, title and interest in and to such ideas and the forms of expression of ideas, including all rights of copyright therein.

Further, Client acknowledges that the methodologies that Consultant utilizes in performing Consultant's services are proprietary to Consultant, which methodologies include without limitation, design specifications, program maintenance documents, platforms and program structures. Client agrees to not disclose such proprietary information to any parties that may be competitors of Consultant without Consultant's prior written consent absent an uncured default under the terms of this agreement. This provision shall remain in force during the period that Consultant provides services for Client's benefit and for a period of three years thereafter.

Both parties agree to not, directly or indirectly, during the period that Consultant provides services for Client, and for a period of one year thereafter, solicit, employ or hire or induce to hire any person who is or had been an employee of either party unless otherwise consented to in writing.

Client agrees that Consultant shall be compensated for our services on a time and materials basis based on the rates set our in Schedule A, page 4, along with reimbursement for any out-of-pocket travel expenses. In connection thereto, Client agrees to pay such invoices within thirty (30) days after receipt of same. In the event that such invoices are not paid by their due date, same shall accrue interest until paid at the less or eighteen percent (18%) per annum or the maximum rate allowed by applicable law. In the event that it is necessary for Consultant to retain the services of an attorney to collect said amounts, Client agrees to pay the reasonable costs incurred by Consultant for such attorney's fees.

Consultant represents and warrants to exercise reasonable efforts and diligence to perform the Services. Except for the express warranty in the preceding sentence, all Services provided by Consultant under such separate

agreements are provided without any express or implied warranty in fact or in law whatsoever. Consultant specifically disclaims all warranties regarding such Services, including any warranties of merchantability or fitness for a particular purpose. Notwithstanding any provision herein to the contrary, Consultant shall not be liable for any indirect, incidental or consequential damages, including lost profits, sustained or incurred in connection with any act or omission related to Consultant's performance regardless of the form of action, whether in contract or tort or otherwise (including negligence, strict liability or otherwise) and whether or not such damages are foreseen or unforeseen. In the event that this provision fails of its essential purpose, Consultant's liability hereunder shall not exceed the total of the fees paid to Consultant by Client as to any separate project provided, however, in no event shall such amount be in excess of $25,000.00 (USD) in the aggregate. Any action arising from or in connection with Services provided by Consultant must be brought within (1) year after the cause of the action arises.

No provision of this letter agreement shall be construed to apply to be enforced in any case where its application would be void under any applicable rule against perpetuities, rule limiting suspension of the power of alienation, or other similar.

This letter agreement shall be construed under an in accordance with the laws of the State of Texas, and all obligations of the parties created hereunder are performable in Harris County, Texas.

In case any one or more of the provisions contained in this letter agreement shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision thereof and this letter agreement shall be construed as if such

invalid, illegal or unenforceable provision had never been contained herein.

Each party hereto acknowledges that a remedy at law for any breach or attempted breach of this letter agreement will be inadequate, agrees that each party hereto shall be entitled to specific performance and injunctive and other equitable relief in case of any such breach or attempted breach and further agrees that any bon required for the securing of such injunctive or other equitable relief shall be in the nominal amount of $1,000.00 (USD). Provided, however, that this provision shall not be construed to deny the recovery of damages caused by a breach hereof.

This letter agreement shall be binding upon and, where allowed pursuant hereto, issue to the benefit of the parties hereto and their respective heirs, executors, administrators, legal representatives, successors and assigns.

BLASE INDUSTRIES CORPORATION
Doing business as WILSON SOLUTIONS

BY: *Gaynell Wilson*
TITLE: *CEO*

ACKNOWLEDGED AND AGREED TO
This 9th day of April, 1998

Anorad Corporation

BY:*Paul V. Rossi*
TITLE: *CFO*